Petition

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81-1464
No.

IN THE
Supreme Court of the United States
Spring Term, 1982

EMEILIA CANN and CHARLES CANN

Petitioners

vs.

FORD MOTOR COMPANY

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Emeilia and Charles Cann, the petitioners herein, pray that a writ of certiorari issue to review the order of the Second Circuit Court of Appeals entered in the above-entitled case on November 2, 1981.

Questions Presented

Whether Rule 407 of the Federal Rules of Evidence, which by its terms excludes evidence of subsequent remedial measures offered "to prove negligence or culpable conduct," is inapplicable to strict products liability actions.

Parties to the Proceeding

All the parties to the proceeding in the United States Court of Appeals for the Second Circuit are listed in the caption above.

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Reports of Opinions

The only reported opinion in the case at bar is that of the United States Court of Appeals for the Second Circuit decided on August 19, 1981. The opinion is reported in 658 F2d 54, No. 80-7603, slip opinion 837. A copy of this opinion is attached in the Appendix.

Jurisdictional Grounds

This petition for writ of certiorari to the Second Circuit Court of Appeals is sought to review that court's order, entered November 2, 1981, denying the Petitioners petition for a rehearing en banc. The rehearing was sought to suggest that the Second Circuit change that portion of its decision of August 19, 1981 dealing with the admissibility of evidence of post-accident design changes.

Rules Involved

Federal Rule of Evidence 403:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Federal Rule of Evidence 407:

Subsequent Remedial Measures

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as

proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Statement of the Case

This is a personal injury case arising from an incident which occurred on November 15, 1976, in Penn Yann, New York, when a 1976 Mercury Marquis automobile manufactured by the defendant Ford Motor Company moved into reverse gear and struck the plaintiff Emeilia Cann, severely injuring her. As a result of this tragedy, the plaintiffs brought this suit to recover under the law of negligence and strict liability.

The plaintiffs contended that while stopping at a gas station, Mr. Cann left the engine of his car running and placed the gear shift lever to a position that appeared to him to be in park. He then got out of the car, heard his wife scream, and saw the car moving in reverse. Mrs. Cann, who does not know how to drive, was injured when trying to get out of the moving car.

At trial the plaintiffs attempted to submit evidence both of subsequent remedial modifications made by the defendant to the transmission and of subsequent warnings made by the defendant concerning the alleged defect. This evidence was excluded by the trial judge.

A jury trial was had in this case in the United States District Court for the Western District of New York, Judge Burke presiding. The basis for jurisdiction was diversity of citizenship under 28 U.S.C. §1332.

The jury answered special verdict questions in the negative, and the court entered judgment dismissing the plaintiffs' causes of action in negligence and strict products liability.

On appeal to the United States Court of Appeals for the Second Circuit, the court vacated the lower court judg-

ment and remanded the case for a new trial. In its opinion, 658 F2d 54 (August 19, 1981) the Second Circuit made three distinct holdings, only the last of which is pertinent to this petition:

1. The trial court abused its discretion when it refused to permit the plaintiffs to object to the court's special verdict questions out of the hearing of the jury;

2. The special verdict questions, being phrased in the conjunctive rather than disjunctive form, created an unfair obstacle to the jury's returning an answer favorable to the plaintiffs;

3. Under Rule 407 of the Federal Rules of Evidence, evidence of post-accident design modifications and warnings are inadmissible even in strict products liability actions.

The plaintiffs then made a limited petition for a rehearing en banc solely on that portion of the Second Circuit's decision disallowing evidence of post-accident design changes and warnings. The plaintiffs were and are fully satisfied with all other portions of the Second Circuit's decision.

On November 2, 1981 the Second Circuit denied the plaintiffs' motion for a rehearing en banc. The plaintiffs now seek review of this decision by a petition for writ of certiorari.

Reasons for Granting the Writ

As expressly noted by the court below, the division among the federal courts regarding Rule 407's applicability in a strict liability action is apparent. The following courts have held that Rule 407's prohibition of evidence of post-accident measures does not apply to actions based on strict liability: *Robbins v. Farmers Union Grain Terminal Association,* 552 F2d 788, 793 (8th Cir. 1977);

Farner v. Paccar, Inc., 562 F2d 518, 528 (8th Cir. 1977); *Unterburger v. Snow Co., Inc.*, 630 F2d 599, 603 (8th Cir. 1980); *Abel v. J.C. Penney Co., Inc.*, 488 F. Supp. 891, 896 (D. Minn. 1980).

In conflict with the preceding cases from the Eighth Circuit both the Second Curcuit, in the case at bar, and the Fourth Circuit, in *Werner v. Upjohn Co., Inc.*, 628 F2d 848, 859 (4th Cir. 1980) have held Rule 407 does apply to strict liability actions. Two other circuit courts which have confronted this issue refused to admit evidence of subsequent remedial measures, but it is unclear whether they were applying Rule 407 in doing so. The relevant decisions are: *Oberst v. International Harvester Co., Inc.*, 640 F2d 863, 866 (7th Cir. 1980) (applying Illinois law) and *Roy v. Star Chopper Co., Inc.*, 584 F2d 1124, 1134 (1st Cir. 1978) (holding only that the trial court did not abuse its discretion in refusing to admit evidence of post-accident repairs).

By its express language, Rule 407 excludes evidence of post-remedial measures "to prove negligence or culpable conduct." The court below noted that this "failure of Rule 407 to refer explicitly to actions in strict liability does not prevent its application to such actions," because the policy reasons behind Rule 407 apply alike to both negligence and strict liability actions. The court elaborated that Rule 407's exclusionary rule is "prompted by the fear that people will be less likely to take subsequent remedial measures if evidence of their repairs or improvements may be used against them in lawsuits arising out of prior accidents," and this fear exists regardless of whether the lawsuit alleges negligence or strict liability. The Fourt Circuit is in agreement with this view of Rule 407. See *Werner v. Upjohn Co., Inc.*, 628 F2d 848 (4th Cir. 1980).

In direct conflict with the Fourth Circuit and the circuit court below is the Eighth Circuit. In *Robbins v. Farmers Union Grain Terminal Association*, 552 F2d

788 (8th Cir. 1977) the court held that Rule 407, by its express terms, is confined to cases involving negligence or other culpable conduct, and the doctrine of strict liability, by its very nature, does not include these elements.

The *Robbins* court then examined the public policy assumptions which underlie Rule 407, and found that while these assumptions justify the 407's exclusionary rule in negligence actions, they are not valid in strict products liability actions. Quoting from *Ault v. International Harvester Co.*, 13 Cal 3d 113, 117 Cal Rptr. 812, 528 P. 2d 1148 (1974), the court stated:

> The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its products, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement.

The court added that not only does the exclusionary rule of 407 have no anti-deterrent function in strict products liability cases, "the application of the rule would be contrary to the public policy of encouraging the distributor of mass-produced goods to market safer products."

The Eighth Circuit has affirmed its holding in *Robbins*, supra, in *Farner v. Paccar, Inc.*, 562 F2d 518 (8th Cir. 1977) and *Unterburger v. Snow Co., Inc.*, 630 F2d 599 (8th Cir. 1980).

The issue of whether Rule 407 excludes evidence of subsequent remedial measures in strict products liability has sufficiently fermented in the courts below, where both the policy reasons of Rule 407 as well as its history have been considered. The result has been a

direct conflict between the circuits on an evidentiary rule which calls for uniform treatment in all Federal courts. In light of this conflict and in light of the importance of evidence of subsequent remedial measures in products liability cases, your petitioners respectfully request this court to review the decision of the court below by certiorari.

Conclusion

For the reasons stated above, a writ of certiorari should issue to review the decision of the Second Circuit.

Respectfully submitted,

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DATED: January 21, 1982

Appendix

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the second day of November, one thousand nine hundred and eighty-one.

———————————————————x

EMEILIA CANN and CHARLES CANN,

Plaintiffs-Appellants,

-v-

FORD MOTOR COMPANY,

Defendant-Appellee.

———————————————————x

No. 80-7603

A petition for rehearing containing a suggestion that the action be reheard in banc having filed herein by counsel for the plaintiffs-appellants, Emeilia Cann and Charles Cann,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

(original signed)

A. Daniel Fusaro
Clerk

By Francis X. Gindhart
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 837—September Term, 1980

(Argued February 19, 1981 Decided August 19, 1981)

Docket No. 80-7603

EMEILIA CANN and CHARLES CANN,

Plaintiff-Appellants,

—v.—

FORD MOTOR COMPANY,

Defendant-Appellee.

Before:

VAN GRAAFEILAND and MESKILL, *Circuit Judges,*
and STEWART, *District Judge.**

* Honorable Charles E. Stewart, Jr., United States District Judge for the Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Western District of New York, Burke, *J.*, entered after a jury verdict for the defendant on plaintiffs' claims alleging negligence and strict products liability.

Reversed and remanded.

KEVIN J. SULLIVAN, Buffalo, New York (Paul W. Beltz, Buffalo, New York, Charles Herring, Jr., Gochman & Weir, San Antonio, Texas, of counsel), *for Appellants.*

GEORGE M. GIBSON, Buffalo, New York (Brian P. Crosby, Damon, Morey, Sawyer & M[illegible], Buffalo, New York, of counsel), *for Appellee.*

MESKILL, *Circuit Judge*:

In this diversity action, plaintiffs appeal from a judgment entered upon a special verdict for the defendant in the United States District Court for the Western District of New York, Burke, *J.*, dismissing their causes of action in negligence, breach of warranty, and strict products liability.

The jury heard evidence that on November 15, 1976, Charles Cann, accompanied by his elderly wife, Emeilia, drove a 1976 Mercury Marquis automobile, a Ford product, to a service station in Penn Yan, New York. Upon arriving, Mr. Cann shifted into what he thought was "park," left his engine running, set his parking brake, and

got out of the car. When he slammed the door the car shifted into reverse and began to move. Mrs. Cann, who did not know how to drive, fell trying to get out of the car, and was struck and seriously injured by it.

Plaintiffs argued that Ford was liable for the injuries they sustained, on the grounds of negligence, breach of warranty, and strict products liability. They introduced evidence that the transmission could appear to be in "park" when in reality it was not, and that when the transmission was "hung up" in this fashion it could slip into reverse.[1] Plaintiffs' expert witness suggested various feasible design changes to reduce or eliminate this problem. Plaintiffs also introduced evidence that Ford failed to warn consumers of the dangers to which the allegedly defective design exposed them and failed to advise them of the measures which drivers could take to prevent an accident. Their expert witness testified that "a positive and clear warning" should have been prominently posted on the visor of each new car or at least included in the Owner's Manual provided by the manufacturer. Plaintiffs further argued that although Ford had been aware of the problem since at least 1971, it had not taken adequate remedial measures. Plaintiffs, however, were not allowed to present evidence of remedial measures taken by Ford subsequent to the accident.

Ford offered expert testimony that its gearshift conformed to the industry's state of the art and that there were no significant differences between Ford's gearshifts and those in other contemporary cars. Ford blamed the

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1 Plaintiffs also argued that the design of the parking brake was defective. The parking brake was designed to release itself automatically when the car was put into reverse. Plaintiffs conceded that this design feature was not dangerous in some cars, but they argued that it was dangerous to incorporate this feature into a car which might unexpectedly slip into reverse.

accident on Mr. Cann's haste, arguing that he failed to position the gearshift properly. Furthermore, Ford stressed that the accident would not have happened had the Canns taken advantage of built-in safety features in the Mercury like the warning buzzer that sounds when the driver's door is opened while the key is left in the ignition. Finally, Ford argued that Mrs. Cann would not have fallen out of the car had she fastened her seat belt.

The plaintiffs abandoned their breach of warranty claims at trial, and therefore the case was submitted to the jury only under the theories of the negligence and strict products liability. After some prodding by the court, counsel filed requests to charge; the court ruled on the requests and these rulings are not challenged on this appeal. The court *sua sponte* submitted to the jury two written questions on liability and two blanks to record the damages suffered individually by Emeilia and Charles Cann. The jury was instructed to answer the questions "yes" or "no," but to determine damages only if they answered "yes" to at least one of the two questions respecting liability. These questions read:

> *First Cause of Action*: Have the plaintiffs proved by a fair preponderance of the evidence that the accident of November 15, 1976 was caused by the negligence of the defendant Ford Motor Co. in careless manufacture, design, fabrication, maintenance, repair, upkeep and failure to recall the 1976 Mercury automobile?
>
> *Third Cause of Action*: Have the plaintiffs proved by a fair preponderance of the evidence that the accident of November 15, 1976 was caused by the fact that the 1976 Mercury, its parts and apparatus,

were not fit for the purpose for which they were intended; that the said automobile was unreasonably dangerous for normal and ordinary use; [and][2] that the defendant Ford Motor Co. failed to recall said vehicles and therefore that the defendant Ford Motor Co. is liable in tort to the plaintiffs[?]

The record does not reveal a request for a special verdict nor does it indicate the source of the questions. They were evidently not disclosed to counsel before the court read them to the jury.

Following the reading of the charge and the submission of the special verdict questions to the jury, the court asked counsel if they had any exceptions or additional requests. Counsel for appellants asked that the exceptions be made outside the presence of the jury in accordance with Rule 51, Fed. R. Civ. P. Judge Burke insisted that any exceptions be taken then and there. Plaintiff's counsel made one exception not raised in this appeal. He declined to make further exception until after the jury retired when he promptly excepted "to the court's charge and also to the issues submitted to the jury." He proceeded to detail objections to the inclusion in the first question of the conjunction "and" after the alternative bases for proving negligence were listed, as requiring the plaintiff to prove all of the recited theories in order to recover. He further objected to the inclusion in the second question of the phrase "fit for the purpose for which they were intended." And, finally, he objected that the conjunction "and" in the second question required the plaintiffs to prove "every one of those alternative theories instead of

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2 When the trial judge read the questions to the jury, he inserted the conjunction "and" at this point.

allowing the plaintiffs to prevail upon the proof of negligent design which is our main contention in this case."

The jury answered both questions in the negative and the court entered judgment dismissing the complaint. On this appeal the Canns claim that the court erred in (1) its refusal to permit objections to the charge out of the hearing of the jury, (2) its phrasing of the special verdict questions, and (3) its exclusion of evidence of subsequent remedial measures as to the product liability claim.

DISCUSSION

A. *Court's Failure to Permit Objections Out of Hearing of Jury*

Rule 49(a) Fed. R. Civ. P. (Special Verdicts and Interrogatories) and Rule 51 (Instructions to Jury: Objections) require that objections under these provisions be made before the jury retires. Rule 51 provides that "[n]o party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires." Rule 49(a) provides that "[i]f . . . the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury." Rule 51 also requires that "[o]pportunity . . . be given to make the objection out of the hearing of the jury." Rule 49(a) contains no such language. It is well settled in this Circuit that, when the trial court errs by refusing to permit a party's objections to a charge to be made out of the hearing of the jury, the party's failure to object before the jury retires is

excused and his objections may be raised on appeal. *Bentley* v. *Stromberg-Carlson Corp.*, 638 F.2d 9, 12 (2d Cir. 1981).

Even though Rule 49(a) does not contain language similar to that of Rule 51 requiring that the trial court hear objections out of the hearing of the jury, logic requires similar treatment where, as here, the special verdict questions were included in the charge. In cases such as this, there is no reason to give parties less protection when they object to the phrasing of a special verdict question than when they object to the phrasing of general instructions. Therefore, the failure to permit the objections to the special questions out of the hearing of the jury was an abuse of the trial court's discretion and we will consider these objections preserved for appeal.

The formulation of special verdict questions rests in the discretion of the trial judge, *Tights, Inc. v. Acme-McCrary Corp.*, 541 F.2d 1047, 1060 (4th Cir.), *cert. denied*, 429 U.S. 980 (1976); *McDonnell v. Timmerman*, 269 F.2d 54, 58 (8th Cir. 1959); *Norfolk Southern Ry. Co. v. Davis Frozen Foods, Inc.*, 195 F.2d 662, 666 (4th Cir. 1952), and therefore our review is confined to inquiring whether the trial court's submission of the issues in the form of these questions constituted an abuse of discretion. *Tights, Inc.* v. *Acme-McCrary Corp., supra*, 541 F.2d at 1060; *see Abernathy* v. *Southern Pacific Co.*, 426 F.2d 512, 514 (5th Cir. 1970). We will reverse a judgment entered upon answers to questions which mislead and confuse the jury or which inaccurately frame the issues to be resolved by the jury. *See Dougherty* v. *Continental Oil Co.*, 579 F.2d 954, 958 (5th Cir. 1978); *Dreiling* v. *General Electric Co.*, 511 F.2d 768, 774 (5th Cir. 1975); *Stemler* v. *Burke*, 344 F.2d 393, 397 (6th Cir. 1965); *Scott* v. *Isbrandtsen Co.*, 327 F.2d 113, 119 (4th Cir. 1964).

Appellants complain that the special questions were phrased in the conjunctive rather than the disjunctive—that the questions should have read "or" rather than "and." Appellants claim that they should have prevailed on the negligence count upon their proof that the accident was caused by the negligent design of the Mercury. They assert that the conjunctive form of the question prevented the jury from returning a verdict in their favor on that basis alone. Thus, they contend that before the jury could answer the negligence question in the affirmative, they also had to find that Ford was negligent in its manufacture, fabrication, maintenance, retair, upkeep, and failure to recall the Mercury. We conclude that the submitted question created an unfair obstacle to the jury's returning an answer favorable to the plaintiffs. The second question addressed to the strict liability count is equally flawed because, in the form read to the jury, it was also phrased in the conjunctive rather than the disjunctive.

Appellees respond that the jury was not misled by the phrasing of the questions because they knew that plaintiffs' primary contention at trial had been that the Mercury was negligently or defectively designed. However, just as we must assume that the jury follows the law as it is explained to them by the judge, *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933); *Lifetime Siding, Inc.* v. *United States*, 359 F.2d 657, 661 (2d Cir.), *cert. denied*, 385 U.S. 921 (1966), we cannot assume that the jury ignored the literal, grammatical meaning of the written questions posed by that same judge. Accordingly, the judgment dismissing the complaint must be reversed and the case remanded for a new trial solely on the negligence and strict products liability claims.

In addition to the reversible error discussed above, the special verdict contained other deficiencies which should be remedied on retrial. The first question requested the jury to determine whether Ford had acted negligently in a number of matters, some of which were never raised at trial. For example, our review of the record does not reveal any evidence of negligent repair or upkeep of the Mercury by Ford and, therefore, these matters should not have been included in the question. In the second question, the court should not have included the phrase "fit for the purpose for which they were intended" in a question respecting strict products liability. That phrase relates to the implied warranty action, *see* Note, *Analyzing "Defect" in New York Products Liability Law: The Proof Is in the Product,* 29 Syracuse L. Rev. 1217, 1231-32 (1978), contained in the complaint but abandoned at trial. Finally, the special verdict did not contain a separate inquiry into the existence and percentage of any comparative negligence on the part of Emeilia or Charles Cann. Such an inquiry would help focus the jury's deliberations on a major issue in this case—the alleged contributory negligence of the plaintiffs.

B. *Evidentiary Rulings*

Appellants assign as error the court's refusal to permit them to introduce proof that in 1980 Ford modified the design of its transmission and that in 1978 Ford changed its Owner's Manual to specifically instruct drivers to turn off the ignition before leaving the car. We find no merit in this claim.

The admissibility of the post-accident warning is controlled by *Lindsay* v. *Ortho Pharmaceutical Corp.*, 637 F.2d 87, 94 (2d Cir. 1980), which held that when evidence

of post-accident warnings is offered "the court must consider under Rule 403 whether its probative value is outweighed by the danger of unfair prejudice and confusion." When evidence of post-accident design changes is offered, Rule 403 again requires the court to consider whether the probative value of the evidence is outweighed by the danger of unfair prejudice and confusion. In addition to Rule 403's general safeguard against admitting unfairly prejudicial evidence, Rule 407 speaks even more directly to the admissibility of evidence of post-accident design changes. Rule 407[3] excludes evidence of post-remedial measures "to prove negligence or culpable conduct" unless the evidence is offered "for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment." Appellants argue that Rule 407 is inapplicable in strict products liability actions, because such actions do not involve "negligence or culpable conduct." Courts have split over the proper resolution of this issue. *Compare Farner* v. *Paccar, Inc.*, 562 F.2d 518 (8th Cir. 1977) *and Robbins* v. *Farmer's Union Grain Terminal Ass'n*, 552 F.2d 788 (8th Cir. 1977) *with Oberst* v. *International Harvester Co.*, 640 F.2d 863 (7th Cir. 1980) *and Werner* v. *Upjohn Co.*, 628 F.2d 848, 857 (4th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3493 (U.S. Jan. 13, 1981), but for the reasons set forth below we refuse to so limit the scope of Rule 407.

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3 Fed. R. Evid. 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The failure of Rule 407 to refer explicitly to actions in strict liability does not prevent its application to such actions. When Congress enacted the Federal Rules of Evidence, it left many gaps and omissions in the rules in the expectation that common-law principles would be applied to fill them. *See Werner* v. *Upjohn Co., supra,* 628 F.2d at 856; K. Redden & S. Saltzburg, *Federal Rules of Evidence Manual* 411-13 (1975). The application of those principles convinces us that although negligence and strict products liability causes of action are distinguishable, no distinction between the two justifies the admission of evidence of subsequent remedial measures in strict products liability actions.

The rule excluding evidence of subsequent remedial repairs represents a common sense recognition that people are loath to take actions which increase the risk of losing a lawsuit. Rule 407 is prompted by the fear that people will be less likely to take subsequent remedial measures if evidence of their repairs or improvements may be used against them in lawsuits arising out of prior accidents. *Werner* v. *Upjohn Co., supra,* 628 F.2d at 857. Appellants point out that a negligence action places in issue whether the defendant's conduct was reasonable while a strict liability action involves whether the product was defective; they note that the jury focuses on the *defendant* in a negligence action, but solely upon the *product* in a strict liability action. However, the defendant must pay the judgment in both situations, regardless of where the jury's attention focused when they found against him. Since the policy underlying Rule 407 not to discourage persons from taking remedial measures is relevant to *defendants* sued under either theory, we do not see the significance of the distinction. A potential defendant must be equally concerned regardless of the

theoretical rubric under which this highly prejudicial, *Smyth* v. *Upjohn Co.*, 529 F.2d 803, 804 (2d Cir. 1975), and extremely damaging evidence. *Bauman* v. *Volkswagenwerk Aktiengesellschaf*, 621 F.2d 230, 233 (6th Cir. 1980); *see also Caprara* v. *Chrysler Corp.*, 52 N.Y.2d 114, 134-35, 436 N.Y.S.2d 251, 262, 417 N.E.2d 545, 555-56 (1981) (Jasen, dissenting), is admitted. Furthermore, as happened here, plaintiffs frequently bring actions sounding in both negligence and strict liability. In sum, we hold that Rule 407 applies to strict products liability actions.[4]

The judgment is vacated and the case remanded for a new trial. The parties shall bear their own costs.

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4 We leave to the trial judge the determination of whether the evidence may be admitted at retrial under one of the exceptions to Rule 407.

Opposition

Office - Supreme Court, U.S.
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ALEXANDER STEVAS,
CLERK

81-1464

No. _____

IN THE

Supreme Court of the United States

October Term, 1981

EMEILIA CANN and CHARLES CANN,
Petitioners,

vs.

FORD MOTOR COMPANY,
Respondent.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION

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Questions Presented

1. Whether, in a products liability case in which federal jurisdiction is based on diversity of citizenship, proof that a manufacturer is "strictly liable" for selling a product that is "defectively" designed is proof of "culpable conduct" as the latter term is used in Federal Rule of Evidence 407.

2. Whether, under Federal Rules of Evidence 403 and 407, the United States Court of Appeals for the Second Circuit correctly upheld the decision of the trial judge to exclude evidence of post-accident remedial measures.

Parties

The caption to the case contains the names of all parties to the proceeding in the Court of Appeals for the Second Circuit whose judgment is sought to be reviewed.

In response to U.S. Sup. Ct. Rule 28.1, Ford Motor Company states that it has no parent company. Its less than wholly owned subsidiaries and affiliates are listed in the Appendix (p. 15).

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IN THE

Supreme Court of the United States

October Term, 1981

No. _____

EMEILIA CANN and CHARLES CANN,
Petitioners,

vs.

FORD MOTOR COMPANY,
Respondent.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION

Statement of the Case

This action for personal injuries arises out of an incident which occurred on November 15, 1976. On that date plaintiff, Charles Cann, drove his 1976 Mercury Marquis to a gas station in Penn Yann, New York. His wife, plaintiff Emeilia Cann, was a passenger in the front seat. While at the gas station, Mr. Cann got out of the vehicle and left the engine running. As he was walking toward the gas station office, the vehicle began to move backward. Mrs. Cann opened the passenger door to call to her husband and fell from the car.

Plaintiffs subsequently filed this action against Ford Motor Company in the United States District Court for the Western District of New York. The basis of jurisdiction was diversity of citizenship under 28 U.S.C. §1332. In their complaint, plaintiffs alleged causes of action in strict products liability, negligence and breach of express and implied warranties. Prior to trial, plaintiffs withdrew their warranty claims.

At trial, plaintiffs claimed that Ford was liable under theories of negligence or strict liability for alleged defects in the design of the automatic transmission system. Plaintiffs did not present any evidence that the vehicle was in any respect defectively manufactured. In response, Ford contended that the accident happened only because Mr. Cann carelessly mispositioned the shift selector lever of his vehicle between the park and reverse positions. Plaintiffs' expert conceded that if the shift selector lever is properly positioned, neither the shift selector lever nor the transmission can move from park to reverse.

In the course of trial, plaintiffs attempted to show that certain changes to the design of the transmission control system were made by Ford in 1980. Plaintiffs also attempted to show that, in 1978, Ford modified certain relevant language in its owner's manuals. The trial court excluded this evidence.

The jury returned a verdict in favor of Ford and judgment was entered accordingly. On appeal, the United States Court of Appeals for the Second Circuit vacated the judgment and remanded for a new trial because of certain procedural errors. However, the Second Circuit upheld the District Court's exclusion of the post-accident changes.

Plaintiffs requested a re-hearing *en banc* on the evidentiary issue, but this petition was denied on November 2, 1981. Plaintiffs' petition for a writ of certiorari followed.

Summary of Argument

The same "conflict" among the Circuit Courts of Appeal raised by plaintiffs' petition was also raised by the petition for writ of certiorari in *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980). This court denied certiorari, 449 U.S. 1080 (1981). There have been no developments since that time which would warrant a reconsideration by this court. As the opinion of the Fourth Circuit Court of Appeals in *Werner* makes clear, the application of Federal Rule of Evidence 407 in a strict liability case is peculiarly dependent on what "strict liability" means under state law. In design cases such as this, for example, strict liability is defined differently in the various states and involves different degrees or types of "negligence or culpable conduct". No important issue of federal law is involved.

In addition, the policies underlying Rule 407 can appropriately be considered by the trial judge in a discretionary ruling under Rule 403. The factors which influence a Rule 403 ruling will vary from case to case, and such an exercise of discretion therefore implicates no issue of law requiring uniform treatment in all federal courts.

ARGUMENT

POINT I

This case involves no important issue of federal law. The purported conflict among the Circuit Courts of Appeal is attributable to the fact that the substantive state law defining "strict liability" in design defect cases varies from state to state.

The general issue raised by this case involves the application of Federal Rule of Evidence 407 to a product liability case. This same issue was involved in *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). The opinion of the Fourth Circuit in *Werner* makes it plain that Rule 407 cannot be interpreted in the abstract; rather it must be interpreted in light of the state substantive law which governs the action. The important issues relate to state, not federal, law. This was pointed out by the defendant in *Werner* in response to the plaintiff's petition for a writ of certiorari (see Respondent's Brief at 18-23). This Court declined to consider the issue in 1981, and nothing has occurred to cause a reconsideration of that determination in 1982.

Insofar as relevant to these proceedings, Federal Rule of Evidence 407 provides that evidence of subsequent remedial measures "is not admissible to prove negligence or culpable conduct." The specific issue raised by this case is whether proof that a manufacturer is "strictly liable" for selling a "defectively" designed product is equivalent to proof of "culpable conduct". If it is, evidence of post-accident remedial measures is not admissible under the express terms of the rule. The resolution of this issue necessarily depends upon resolution of two subsidiary issues: (1) the meaning of the term "culpable conduct" as it is used in Rule 407; and (2) the meaning under applicable state law of "strict liability" in a "design defect" case.

A. The Meaning of "Culpable Conduct".

The analysis of the first question is relatively straightforward. "Culpable" can be defined in various ways, including "blamable", "commission of a fault" or "involving the breach of a legal duty". Black's Law Dictionary 454 (Rev'd. 4th Ed. 1968). The term is clearly not meant to be synonomous with negligence, or there would have been no need for Rule 407 to refer to "negligence *or* culpable conduct". Since there is no recognized cause of action for "culpable conduct", the term is generic in nature and intended to refer to at least some of the various kinds of conduct that are actionable under state or federal law. For purposes of this brief, it can be assumed that "culpable" is intended to refer to fault of a nature similar (but not identical) to negligence.

B. The Meaning of "Strict Liability" in a Design "Defect" Case.

The right to recover under a theory of "strict liability" is, of course, governed by state law. Whether "strict liability" involves "culpable conduct", or fault analogous to negligence, cannot be determined without examining state law. The test of "strict liability" in a case involving the design of a product varies from state to state. The various tests used are all related, directly or indirectly, to the law of negligence.

(1) *The Restatement Test and Its Variations.* The starting point for any analysis of strict design liability is necessarily Section 402A of the Restatement (Second) of Torts which was adopted in 1965 by the American Law Institute. That Section provides that a manufacturer who sells any product in a "defective condition unreasonably dangerous to the user or consumer" may be held liable without proof of negligence.

As applied to manufacturing defects, this Section has gained almost universal acceptance and has caused little controversy. A product that is incorrectly manufactured and deviates in some way from its intended design can be readily characterized as defective. In contrast, it is not at all clear what it means to characterize the intended design itself as "defective". *See generally,* Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence,* 33 Vand. L. Rev. 593, 599-600 (1980); Hoenig, *Product Designs and Strict Liability: Is There a Better Approach,* 8 Sw. L. Rev. 109 (1976). It was perhaps because of this difficulty that the drafters of the Restatement qualified the term "defective" with the phrase "unreasonably dangerous". Some states have held, however, that requiring proof of an unreasonable danger burdens "the injured plaintiff with proof of an element which rings of negligence." *Cronin v. J.B.E. Olson Corp.,* 8 Cal. 3d 121, 132, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972); *Azzarello v. Black Brothers Co.,* 480 Pa. 547, 391 A.2d 1020 (1978). As a result, some jurisdictions require proof only that a product is "defective" in design, not that it is also "unreasonably dangerous". *Cronin, supra; Azzarello, supra; Butaud v. Suburban Marine and Sporting Goods, Inc.,* 81 Al. 3d 384, 543 P.2d 209 (Alaska, 1975). Other jurisdictions require the exact opposite and hold that a plaintiff need not prove "defect" as a separate element, but need establish only that a product is unreasonably dangerous. *Seattle—First National Bank v. Tabert,* 86 Wash. 2d 145, 542 P.2d 774 (1975). Still other jurisdictions adhere by case law or statute to the Restatement formulation. *E.g., Byrns v. Riddell, Inc.,* 113 Ariz. 264, 550 P.2d 1065 (Ariz. 1976); Or. Rev. Stat. §30.920.

(2) *The Negligence Test and Its Variations.* Whether the states have followed the Restatement or not, they have almost invariably found it necessary, in a design

case, to further define "defective" or "unreasonably dangerous". Some courts, for example, follow the lead of Dean Prosser, the reporter for the Restatement (Second) of Torts, and hold that "although liability for defective design may occasionally be called strict [it] appears to rest primarily upon a departure from proper standards of care, so that the tort is essentially a matter of negligence." Prosser, Handbook of the Law of Torts §96 at 644 (4th Ed. 1971). *Bolm v. Triumph Corp.*, 71 A.D.2d 429, 422 N.Y.S.2d 969 (1979); *Ford Motor Co. v. Hill*, 404 So.2d 1049 (Fla. 1981).

Other courts have held that strict liability is essentially the same as negligence, except that the manufacturer is deemed to have knowledge of the product's dangerous characteristics. Under this test, a defective product is one "which a reasonable person would not put into the stream of commerce if he had knowledge of its harmful character. The test, therefore, is whether the seller would be negligent if he sold the article knowing of the risk involved." *Phillips v. Kimwood Machine Co.*, 269 Or. 581, 525 P.2d 1033 (1974). As one commentator has recently noted, this "modified" negligence standard does not, as a practical matter, differ from the traditional negligence test.

> "Under negligence principles, the manufacturer is held to the standard of an expert in the field, and is therefore chargeable with knowing all that the circumstances reasonably dictate. Accordingly, there can be no significant difference between negligence and strict liability [under the test which attributes knowledge to the manufacturer] unless manufacturers are to be held liable for failing to design against risks that were unforeseeable when the product was marketed. Few, if any, courts would allow imposition of liability for unknowable or unforeseeable risks." Hoenig, *Resolution of "Crashworthiness" Design Claims*, 55 St. John's L. Rev. 633, 661-662 (1981).

(3) *The Risk-Utility Balancing Test.* Other jurisdictions have adopted a balancing test for strict liability. Under this test, a product is "defective" or "unreasonably dangerous" if the benefits of the challenged design outweigh the risk of danger inherent in that design. *E.g., Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979); *Brady v. Melody Homes Manufacturers*, 121 Ariz. App. 253, 589 P.2d 896 (1978). As some courts have noted, this balancing test is nothing more than a traditional approach to determining design safety under a negligence theory. *E.g., Brady, supra.* For example, the Restatement (Second) of Torts, §291, provides that an act "is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act." Comment b to this Section reinforces this thought: "Conduct is not negligent unless the magnitude of the risk involved therein so outweighs its utility as to make the risk unreasonable."

(4) *The Consumer Expectation Test.* Still another test currently in use for strict liability in design cases is the so-called "consumer expectation" test. This test has its origin in Comment i to Section 402A of the Restatement. Under this test, the product is defective or unreasonably dangerous if it is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." Restatement (Second) of Torts §402A, Comment i (1965); *Leichtamer v. American Motors Corp.*, 67 Ohio 2d 456, 424 N.E.2d 568 (1981); *Seattle—First National Bank v. Tabert*, 86 Wash. 2d 145, 542 P.2d 774 (1975). This language was chosen by the drafters of the Restatement to explain Section 402A's reference to an "unreasonably dangerous" product. "Obviously, the notion of unreasonable danger traces its heritage to the law of negligence." Hoenig, *Resolution of "Crashworthiness" Design Claims*, 55 St. John's L. Rev. 663, 669 (1981).

(5) *Other Tests.* There are numerous combinations and variations of these tests. *See, e.g., Baker v. Lull Engineering Co.*, 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978) (balancing test and consumer expectation test); *Atkins v. American Motors Corp.*, 335 So.2d 134 (Ala. 1976) (defective product is one "not for the ordinary purposes intended"); *Suter v. San Angelo Foundry*, 81 N.J. 150, 406 A.2d 140 (1979) (modified negligence standard and variation of consumer expectation standard).

C. State Law Clearly Affects the Applicability of Rule 407, and No Important Issue of Federal Law is Involved.

The discussion above has merely skimmed the surface of the hundreds of cases, articles and statutes which attempt to give content to the amorphous concepts of "strict liability", "defective design", and "unreasonable danger". As the Supreme Court of Washington noted in deciding what form of strict design liability it would adopt, "it is apparent that we have a potpourri of theories and authorities from which to fashion our criteria, definitions and limitations." *Seattle—First National Bank v. Tabert, supra*, 86 Wash. at 150, 542 P.2d at 779. In the area of design liability, "strict liability" has neither a common definition nor a uniform application; its meaning is different in virtually every state.

Does proof of "strict liability" in a design case involve proof of "culpable conduct"? The answer obviously depends on the meaning given "strict liability" by the state whose substantive law governs the action. New York law happens to govern this particular case, and New York is of the view that the test used in a strict liability design case is equivalent to the reasonable person test used in negligence cases. *Rainbow v. Elia Building Co.*, 79 A.D.2d 287, 436 N.Y.S.2d 480, *affirmed*, ____

N.Y.2d ___ (Slip Opinion, 3/25/82);[1] *Martin v. Julius Dierck Equipment Co.*, 43 N.Y.2d 583, 590, 403 N.Y.S.2d 185, 374 N.E.2d 97 (1978); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 386, 384 N.Y.S.2d 115, 348 N.E.2d 571 (1976); *Bolm v. Triumph Corp.*, 33 N.Y.S.2d 151, 157-8, 350 N.Y.S.2d 644, 305 N.E.2d 769 (1973).

Maryland law was involved in *Werner v. Upjohn Co.*, 628 F.2d 848 (4th Cir. 1980), *cert. denied*, 449 U.S. 1080 (1981). The Fourth Circuit Court of Appeals in that case specifically relied on the fact that under the circumstances of the case Maryland's strict liability law was little different than negligence law.[2] South Dakota and Minnesota, the states involved in *Robbins v. Farmers Union Grain Terminal Assn.*, 552 F.2d 788 (8th Cir. 1977), *Farner v. Paccar*, 562 F.2d 518 (8th Cir. 1977), and *Unterberger v. Snow*, 630 F.2d 599 (8th Cir. 1980), have different views on strict liability. South Dakota apparently attributes knowledge of a product's dangerous character to the manufacturer. *See, Robbins, supra*, 552 F.2d at 794, n.15. Minnesota apparently follows a variation of the consumer expectation test. *See, Farr v. Armstrong Rubber Co.*, 288 Minn. 83, 179 N.W.2d 64 (Minn. 1970).

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[1] Significantly, in *Rainbow*, the New York Court of Appeals recently affirmed a holding that, under New York law, evidence of a subsequent change in design is not admissible in a strict liability design case to show that the earlier design was defective. Thus, the plaintiffs in this diversity case received the same treatment with respect to the evidentiary issue as they would have received in state court.

[2] *Werner* did not involve an allegation of defective design, but an allegation that the product involved was defective because of the absence of adequate warnings. The debate over the meaning of strict liability in failure to warn cases is as heated as the debate over its meaning in design cases. *Compare, Freund v. Cellofilm Properties, Inc.*, 87 N.J. 229, 432 A.2d 925 (1981), with *Woodill v. Parke Davis & Co.*, 79 Ill.2d 26, 402 N.E.2d 194 (1980).

Thus, the differences in application of Rule 407 are best explained by differences in the underlying law of strict liability. Plaintiffs' argument is not based on Rule 407, which is clear and unambiguous, but upon their apparent dissatisfaction with the lack of "strictness" in New York's form of strict liability as compared, for example, with the law of Minnesota or South Dakota. In effect, plaintiffs would have this court embroil itself in divining and articulating a uniform federal law of strict liability in a design defect context. The issue raised by the plaintiffs' petition is simply not subject to a uniform treatment in all federal courts, and is not one that is appropriate for review by this Court.

POINT II

An exercise of discretion under Federal Rules of Evidence 403 and 407 does not raise important issues of federal law.

The Second Circuit in this case did not rely exclusively on Rule 407. It also relied on Rule 403 which provides, in relevant part, that evidence, although relevant and otherwise admissible, may nevertheless be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury." Even assuming that the language of Rule 407 cannot be construed to apply where any form of strict liability is alleged, the policies underlying Rule 407 can still be considered by the district courts under Rule 403. A ruling under Rule 403 in a particular case that the probative value of post-accident remedial measures is outweighed by its potential for unfair prejudice is entitled to great weight on appeal. *E.g., Miller v. Poretsky*, 595 F.2d 780 (D.C. Cir. 1978). Moreover, since the factors which are considered in a Rule 403 ruling will vary from case to case, such an exercise of discretion raises no important issues of federal law.

Exclusionary rules such as Rule 407 are traditionally supported by two policy considerations. The first, noted by the Second Circuit in its opinion below, is the fear the people will be less likely to take subsequent remedial measures if evidence of their improvements may be used against them. The second is the relative lack of probative value of such evidence, and its potential for unfair prejudice. The Second Circuit has previously noted the relevant justifications for the "subsequent repairs" rule, which were summarized by the Supreme Court in *Columbia & Puget Sound Railroad Company v. Hawthorne,* 144 U.S. 202, 207 (1892):

> "[T]he evidence is incompetent, because the taking of such precautions against the future is not to be construed as an admission of responsibility for the past, has no legitimate tendency to prove that the defendant had been negligent before the accident happened, and is calculated to distract the minds of the jury from the real issue, and to create a prejudice against the defendant."
>
> *Smyth v. Upjohn Co.,* 529 F.2d 803, 805 (2d Cir. 1975).

Similarly, the Fourth Circuit in *Werner v. Upjohn Co., supra,* at 855, has also addressed the policy considerations underlying this rule, citing McCormick on Evidence, §275 at 668-69 (2d Ed. 1972):

> "[T]he extrinsic policy of encouraging the remedial safety measures is the predominant reason for holding evidence of these [subsequent] measures to be privileged. It is apparent that the free admission of such evidence for purposes other than as admissions of negligence is likely to defeat this paramount policy. It is submitted that before admitting the evidence for any of these other purposes, the court should be satisfied that the issue on which it is offered is of substantial importance and is actually, and not merely formally in dispute, that the plaintiff

> cannot establish the fact to be inferred conveniently by other proof, and consequently that the need for the evidence outweighs the danger of its misuse."

The responsibility for weighing the relevant factors and applicable policy considerations is ordinarily assigned to the trial court under Rule 403, and it is within the trial court's broad discretion to balance the possible prejudice to a defendant against the probative value of that evidence. *Smyth v. Upjohn Co., supra,* at 805. The plaintiffs in this case have cited no factors that amount to an abuse of discretion by the trial court. In fact, at trial, plaintiffs were allowed to use the 1980 changes (without identifying them as such) as an example of an alternative design. Ford admitted that these changes would have been feasible at the time the accident vehicle was manufactured. Thus, plaintiffs received the principal benefit of the evidence of the design changes, without the danger of unfair prejudice, issue confusion or the possibility of misleading the jury.

The trial court in this action is in the best position to evaluate the circumstances of this case and to apply Rule 403 in an appropriate fashion. Such an exercise of discretion involves no important issue of federal law and is not, therefore, appropriate for review by this court.

Conclusion

The petition for writ of certiorari should be denied, and the judgment of the Court of Appeals for the Second Circuit relative to the evidentiary ruling should not be disturbed. The United States Court of Appeals for the Second Circuit properly applied Rule 403 and Rule 407 of the Rules of Evidence and correctly held that evidence of post-accident remedial measures were properly excluded at the trial of this design defect action under each of those rules. The decision of the Second Circuit does not conflict with any other Circuit Court of Appeals with respect to the scope and application of Rules 407 and 403, but it is simply reflective of the underlying substantive law of New York in a products liability design defect case. The differences between the Second Circuit's decision and the Eighth Circuit cases is one that derives from a vastly different legal context in which the evidence of subsequent measures was offered.

Respectfully submitted,

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Appendix

APPENDIX

List of subsidiaries (other than wholly owned subsidiaries) and affiliates of Ford Motor Company (U.S. Sup. Ct. Rule 28.1).

The principal United States and foreign affiliates and subsidiaries (other than wholly owned subsidiaries) of Ford Motor Company are as follows:

United States:

Pilkington Glass Industries Limited

Foreign:

Ford Motor Company (Belgium) N.V.;
Ford Motor Company of Canada Ltd.;
Ford Motor Company A/S (Denmark);
O/Y Ford A/D (Finland);
Ford-Werke Aktiengesellschaft (Germany);
Ford Nederland N.V. (Holland);
Hokkai Ford Tractor Co. Ltd. (Japan);
Ford Motor Company Aktiebolag (Sweden);
Ford Lio Ho Motor Company Ltd. (Taiwan).

In addition to the foregoing, Ford Motor Company owns varying interests in the dealers in Ford automobiles, trucks or tractors and leasing companies set forth in the following list. The list was accurate as of February 28, 1982, and is the most current listing available:

Bob Beard Ford	Augusta, GA
Coastal Ford	Mobile, AL
Deland Ford/Merc.	Deland, FL
Lewis Dyer Ford/Merc.	Lafayette, GA
Family Ford Sales	Spartanburg, SC
Freeway Ford	Columbus, GA
Steve Harris Ford	LaGrange, GA
Heritage Ford/LM	Cookeville, TN

Heritage Ford/Merc.	Laurinburg, NC
Billy Howell Ford	Cumming, GA
Rick Hunt Ford	Warrenton, VA
King's Colonial FD	Brunswick, GA
King's Crown Ford	Jacksonville, FL
Bo Lovein Ford	Nashville, GA
Lynchburg Ford	Lynchburg, VA
Miracle Ford	Gallatin, TN
Marshall Mize Ford	Chattanoga, TN
Mtn. View Ford	Chattanooga, TN
Nelson Ford	DeFuniak Springs, FL
Old South Ford	Lexington, NC
Ed Sherling Ford	Enterprise, AL
Spalding Ford/LM	Griffin, GA
Wayne Blackwood LM	Rome, GA
Sam Johnson LM	Charlotte, NC
Riverside LM	Madison, TN
Rowan LM	Winter Haven, FL
Southern LM	Decatur, GA
Atlantic Ford-Merc.	Saco, ME
Chemung Ford	Elmira, NY
Roger Karns Ford	Oneonta, NY
Stan Martin Ford	Hudson, NY
Metro Ford Sales	Schenectady, NY
Roberts Motor Sales	Attleboro, MA
Shiretown Ford	Plymouth, MA
Bay State LM	Framingham, MA
Merrimack LM	Methuen, MA
Norman LM	Westbrook, ME
Olde Towne LM	Windsor, CT
Pride LM	Lynn, MA
Sentry LM	Medford, MA
Springfield LM	Springfield, MA
Atchley Ford	Omaha, NE
Borchers Ford/LM	Rhinelander, WI

Century Ford Sales	Arlington Hts., IL
Don Courtney F/M	Sandwich, IL
Erdman-Willkomm FD	Manitowoc, WI
Fox Valley Ford	Aurora, IL
Dee Harrison Ford	Monmouth, IL
Highland Park Ford	Highland Park, IL
Karp's Ford Sales	Houghton, MI
Al Piemonte FD SLS	Melrose Park, IL
Rock River Ford	Rockford, IL
Southgate Ford	Milwaukee, WI
Totten-Evert FD/LM	Marquette, MI
Jim Whalen Ford SLS	Elgin, IL
Willowbrook Ford	Willowbrook, IL
Barrington SLS & SERV	Barrington, IL
Bell LM Sales	Highland Park, IL
Berens LM	Chicago, IL
Joe Carini LM SLS	Waukesha, WI
Libertyville LM SLS	Libertyville, IL
Lombard LM	Lombard, IL
Country Ford	Belle Vernon, PA
Five Points Ford	Aliquippa, PA
Fuller Ford	Cincinnati, OH
Hundley Ford	Providence, KY
Interstate Ford	Miamisburg, OH
Landmark Ford Sales	Hamilton, OH
Bill McCoy Ford	Muncie, IN
Parkview Ford	Middletown, OH
Ramsey-Sturman Ford	Pittsburgh, PA
Dick Ruhl Ford Sales	Columbus, OH
Shoemaker-Finch RD	Springfield, OH
Target Ford	Monroeville, PA
Ernest White Ford	Delaware, OH
Whitewater Ford/LM	Connersville, IN
Woltz & Wind	Heidelberg, PA
Astley LM	Chillicothe, OH

Columbia LM	Indianapolis, IN
Jim Dixon LM	Fairfield, OH
Fort Wayne LM	Fort Wayne, IN
Metropolitan LM	Louisville, KY
Taylor LM Sales	Cincinnati, OH
Blue Springs Ford	Blue Springs, MO
Champion Motor SLS	Dallas, TX
Ben Garner F/M	Starkville, MS
Indian Springs Ford	Kansas City, KS
Interstate Ford SLS	St. Joseph, MO
Middlekauff Ford	Dallas, TX
North Central SLS	Richardson, TX
One Moore Ford	No. Little Rock, AR
Ron Roberts Ford	Wichita Falls, TX
Gus Shaffar Ford	Joplin, MO
Stuard Ford	Ferriday, LA
Westway Motor SLS	Irving, TX
Bob Higgins LM	Texas City, TX
Adrian Ford L/M	Adrian, MI
All American Ford	Saginaw, MI
Alpena Ford/LM	Alpena, MI
Battle Creek Ford	Battle Creek, MI
Al Bennett Ford	Flint, MI
Dick Boyd Ford	Ludington, MI
Candy Ford/Merc.	Charlotte, MI
Mel Farr Ford	Oak Park, MI
Friendly Ford	Monroe, MI
Greenville Ford/LM	Greenville, MI
Tom Holzer Ford	Farmington, MI
Montrose Ford	Akron, OH
Niles Ford/LM	Niles, MI
Renaissance Ford	Detroit, MI
Tom Sheridan Ford	Bryan, OH
Bob Snyder Ford	Orrville, OH
University Ford	Bowling Green, OH

Varsity Ford	Ann Arbor, MI
Village Ford	Dearborn, MI
Lima LM	Lima, OH
Stadium LM	Youngstown, OH
Avalon Ford	Carson, CA
Mel Burns Ford	Long Beach, CA
Chino Hills Ford	Chino, CA
Frank Coletto Ford	Harbor City, CA
Allen Kane Ford	N. Hollywood, CA
Keystone Ford	Norwalk, CA
Manhattan Ford	Manhattan Beach, CA
Tate Ford/LM	Holbrook, AZ
Hollywood LM	Hollywood, CA
Frank Proto LM	Huntington Beach, CA
Santa Barbara LM	Santa Barbara, CA
Van Nuys LM	Van Nuys, CA
Bee Ford	Waterbury, CT
Best Ford, Inc.	Queens Village, NY
Bridge Ford	Brooklyn, NY
Dan Buckey Ford	Spring Valley, NY
C & C Motors	Horsham, PA
Century Ford	Rockville, MD
Champion Ford	Baltimore, MD
Bob Doran Ford	Union, NJ
Empire Ford	Mt. Vernon, NY
Family Ford	Netcong, NJ
Gateway Ford	Ozone Park, NY
Hopkins Ford	Jenkintown, PA
Kuhns-Harnish Ford	Mechanicsburg, PA
Manhattan Ford/LM	New York, NY
Marple Ford	Broomall, PA
McCafferty Ford SLS	Langhorne, PA
Northport Ford	E. Northport, NY
Popular Ford	Brooklyn, NY
Bob Thomas Ford	Hamden, CT

Bill Tonyes Ford	Haverstraw, NY
Tower Ford	Baltimore, MD
Tristate Ford	Elkton, MD
White Plains Ford	White Plains, NY
Hassett LM	Wantagh, NY
Knight LM	Wynnewood, PA
New Rochelle LM	New Rochelle, NY
North Star LM	Poughkeepsie, NY
Sheehy LM	Springfield, PA
Fitzgerald Ford	Gig Harbor, WA
Heritage Ford	Modesto, CA
Hilltop Ford Sales	Richmond, CA
Jim Houston Ford	Seattle, WA
Kingsrow Ford/LM	Hanford, CA
Lebanon Ford	Lebanon, OR
Pittsburg Ford	Pittsburg, CA
San Bruno Ford	San Bruno, CA
Seekins Ford/LM	Fairbanks, AK
Burlingame LM	Burlingame, CA
Central LM	Eugene, OR
Diablo LM	Concord, CA
River City LM	Sacramento, CA
San Francisco LM	San Francisco, CA
Shen LM	Vallejo, CA
Spokane LM	Spokane, WA
American Auto Lease	Framingham, MA
Chicago Budget R-A-C	Rosemont, IL
Illinois Auto Leasing	Libertyville, IL
Terry's Leasing	Orland Park, IL
Bob Boyd Leasing	Columbus, OH
Dayton Auto Lease	Kettering, OH
Kumfco Auto Lease	Denver, CO
Monarch Leasing	Sunnyvale, CA
Redwood L-M Leasing	San Francisco, CA
Bartow Ford Leasing	Bartow, FL

Appendix

Harding-Strauss Leasing	Richmond, VA
Terry Auto Lease	Pompano Beach, FL
Action Leasing & Rental	Jackson, MS
Don Ford Leasing	Biloxi, MS
Keller Leasing & Rental	Grand Rapids, MI
North Bros. Ford Leasing	Troy, MI
Troy Leasing	Troy, MI
Turner-Flannery Leasing	Troy, MI
Twin Auto Leasing	Plainwell, MI
Peyton Cramer Leasing	Redondo Beach, CA
Miller McVeigh Leasing	State College, PA
Northeast Leasing	Washington, DC